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Active Bar Membership October 15, 2007 Federal Administrative Law Judges: A Critique of the "Active" Bar Membership Regulation

By David J. Agatstein*

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This article relies heavily on previously unpublished material. Many people contributed information and advice, and some devoted significant time and labor researching and responding to my incessant inquiries. It would be impractical to acknowledge all of the contributors by name, but they all have my sincerest thanks and my assurance that I know who they are. (Individuals who are quoted in the article or Appendix are identified by name wherever possible; comments on the NPRM, however, were provided to me with the names redacted.) Accordingly, begging the pardon of my un-named contributors and co-authors, I offer particular thanks for the extensive help and guidance provided by the following: the Association of Administrative Law Judges (AALJ) and its President, Judge Ronald Bernoski (for permission to use material previously restricted to members of AALJ, and for many other courtesies); Hon. Philip J. Simon (who inspired the project and provided guidance throughout); Hon. William A. Wenzel (who drafted the AALJ's monumental and exhaustive response to the NPRM); Professor Gregory L. Ogden and the editorial board of J. NAALJ; Hon. John D. Moreen; Hon. John Geb; and my ever supportive wife, Jeannie Agatstein.

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I. INTRODUCTION

Should a lawyer maintain active bar membership after appointment to the bench? When asked this question, some administrative law judges answered with a resounding "yes", on grounds of professionalism. Others, however, responded with an equally resounding "no", on precisely the same grounds.

The difference of opinion stems from the fact that state laws differ,[1] not only in their details, but in their conceptual framework as well. The correct answer is either "yes" or "no" depending on the state in which the judge is licensed.

Whether a judge should be required to maintain any particular bar status *by an OPM Regulation* however, is an entirely different question. The Regulation, 5 C.F.R. § 930.204(b) provides as follows:[2]

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1. Because there is no single publicly available source of information regarding the bar status rules applicable to ALJs in the various states, I have attempted a preliminary compilation (*see* Appendix).

2. The NPRM, *Examining Systems and Programs for Specified Positions and Examinations (Miscellaneous),* is published at 70 Fed. Reg. 73646 (Dec. 13, 2005) and republished at 70 Fed. Reg. 75745 (Dec. 21, 2005). The final rule, unchanged

> *Licensure.* At the time of application and any new appointment and while serving as an administrative law judge, the individual must possess a professional license to practice law and be authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution. Judicial status is acceptable in lieu of "active" status in States that prohibit sitting judges from maintaining "active" status to practice law. Being in "good standing" is also acceptable in lieu of "active" status in States where the licensing authority considers "good standing" as having a current license to practice law.[3]

This article will address the Regulation insofar as it applies to sitting administrative law judges.[4] It will consider in detail the rule, the exceptions, and the underlying OPM policy. The article will attempt to demonstrate that the Regulation, when considered in context, adversely affects the interests of *all* ALJs, whatever their jurisdiction of licensure.[5]

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from the NPRM, is published at 72 Fed. Reg. 12947, 12955 (Mar. 20, 2007). With respect to the first exception, note that a state that merely prohibits its judges from practicing law, but does not prohibit a judge from voluntarily electing "active" status, does not fall within the literal language of the Regulation. The meaning of the "good standing" exception is also far from clear.

3. 5 C.F.R. § 930.204 (Mar. 20, 2007).

4. The article does not address the bar status prerequisite for ALJ applicants. However, it should be noted that the present ALJ corps includes a number of former trial and appellate judges, some of whom, in accordance with the custom of their respective states, relinquished their active status when they were first elevated to the bench; at the time they applied for the ALJ position they had not been active for many years. The Regulation discussed below is clearly absurd if applied to them.

5. I will discuss only the licensure requirement, but other provisions of the Regulation are far from benign. As FORUM pointed out in its January 4, 2006 comment on the NPRM, the Regulation drastically alters existing qualifications for appointment. The Regulation eliminates the open competitive examination requirement in [the existing rule] and the detailed description of the basic qualifications for ALJ applicants and the ALJ examination and scoring procedures contained in [the current rules. . . . The preamble states] that OPM intends to

The article will proceed as follows. First, it will attempt to reduce misunderstanding by providing a brief history of the divergent methods by which the legal profession is governed in America. It will then argue, in the text or in the footnotes,[6] that the Regulation violates fundamental principles of administrative and Constitutional law, undermines judicial independence, and is invalid for at least eight reasons: *ultra vires,* procedural due process, substantive due process, federalism, vagueness, irrationality, APA compliance and arbitrariness. Because OPM has minimized or ignored these concerns in promulgating the final rule, the article will conclude by urging a judicial remedy.

II. BENCH AND BAR

Writing in 1768, William Blackstone observed that:

> attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall; and are in all points officers of the respective courts in which they are admitted. . . . No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court . . .[7]

Across the Atlantic, in the American colonies, it was more difficult to identify a "regular corps" of attorneys. As one authority

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include a description of ALJ qualifications and the ALJ examination process and criteria in a vacancy announcement. The substantive details of the basic appointment and examination criteria that would be included in such a vacancy announcement would be changeable at will without notice and comment by the public. Continued inclusion of the ALJ qualification and examination procedures in the ALJ regulations is necessary to ensure public confidence in the appointment of a decisionally independent administrative law judiciary.

6. The more technical arguments are discussed only in the footnotes: vagueness (*see infra* note 71), APA Compliance (*see infra* note 42) and substantive due process (*see infra* note 60). The placement is based upon stylistic and not legal considerations, and does not imply that the arguments are any less weighty than those covered in the text.

7. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 26 (1768).

put it, "anyone could be a lawyer who could use a set of legal forms and maintain a position in argument."[8] By the time of the American Revolution, however, courts of general jurisdiction had control over the right of lawyers to appear before them on behalf of clients.[9] Neither the United States Constitution nor the Judiciary Act of 1789 disturbed this arrangement.[10]

As the country expanded, new methods were thought necessary to control access to the legal profession. In the late nineteenth century, during a flood of occupational licensing laws that swept up physicians, embalmers, and street peddlers,[11] four states created boards of bar examiners to license prospective attorneys.[12] Today, in every state, a license is the usual prerequisite for admission to the bar and the practice of law.

The first bar associations in the United States[13] were the Association of the Bar of the City of New York (1870) and the American Bar Association (1878). Their stated purposes were to promote the public interest. Membership in these organizations and many others that followed was entirely consensual.

In 1913 the American Judicature Society, at the urging of its Executive Secretary Herbert Harley, endorsed the concept of an "integrated bar."[14] As described by Chief Justice Rehnquist, the integrated bar is "an association of attorneys in which membership and dues are required as a condition of practicing law [in a State]."[15]

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8. GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING, 855 (2d ed. 1994).

9. *Id.* at 866.

10. Pamela A. McManus, *Have Law License: Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 529 (2000).

11. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 397 (1973).

12. JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 293 (2001).

13. They were preceded by, e.g., the English Incorporated Law Society. 2 JUNE BRYCE, THE AMERICAN COMMONWEALTH 486 (1988).

14. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept*, AM. B. FOUND. RES. J., 9 n.45 (1983).

15. Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990), citing Lathrop v. Donohue, 367 U.S. 820 (1961).

It combines the ideas of private association and state regulation[16] — not unlike the organization of the bar of the future Soviet Union.[17] Nevertheless, the idea took hold: today, thirty-two states have integrated (i.e. mandatory[18]) bars.[19]

The bars of states that are not mandatory are "voluntary", which simply means that there is no required state bar organization. In order to practice law in a "voluntary" state one must be licensed to do so, and, in addition, usually must be admitted to the bar of one or more of the courts before whom one wishes to practice (as in Blackstone's England).

By the late twentieth century, several voluntary states "nonetheless achieved centralized funding and control over lawyer discipline through registration systems. Those typically require that all lawyers in a state register annually with the state's supreme court and pay a registration fee."[20]

The bar status of judges does not necessarily depend on whether the state bar is mandatory or voluntary. In some states (partially as a result of the OPM Regulation[21]) the status of judges—especially

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16. As a legal entity, the integrated bar is "sui generis." Anne E. Melley, AM. JUR. 2D, *Attorneys at Law*, § 7 (2007); *see also* Brotsky v. State Bar of Cal., 57 Cal. 2d 287 (1962).

17. I imply no slam of mandatory bars; I simply point out the historical irony. *See* 1 KAZIMIERZ GRZYBOWSKI & VLADIMIR GSOVSKI, GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE 560 (F.A. Praeger ed., Atlantic Books 1959).

18. In some states the integrated bar is called a "unified bar", presumably because the term "integrated" has civil rights connotations. Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept*, AM. B. FOUND. RES. J., 9 n.45 (1983). The term "unified bar" can be misleading, however; in Harley's day it referred to the fact that, in America, solicitors and barristers constituted one profession. JAMES BRYCE, THE AMERICAN COMMONWEALTH 482 (1904). Moreover, a small but persistent source of confusion arises from the fact that, in some states, the mandatory bar organization is called the "state bar"; in others it is called the "state bar association". Obviously, membership in a private bar association (national, state, local or specialized—the ABA or, for that matter, the NAALJ) confers no right to practice law in any state.

19. *See* Appendix.

20. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 38 (1986).

21. The Civil Service Commission, first created in 1871, was dismantled by Congress in 1978 and its functions were divided between two new agencies: the Merit Systems Protection Board and the Office of Personnel Management.

federal judges and most particularly ALJs—is unsettled. The situation is complicated, and the complications bear heavily on the issues of diversity and federalism raised by the OPM Regulation, as the following discussion will demonstrate.

III. THE ARGUMENT

A. The Regulation is Ultra Vires

In response to the notice of the proposed rule making ("NPRM") one commentator stated:

> While there is little doubt that OPM has statutory authority 'to establish standards with respect to citizenship [etc.] which applicants must meet to be admitted to or rated in examinations' (5 U.S.C. 3105), including ALJ examinations, there is nothing in the Administrative Procedure Act conferring jurisdiction on OPM to set qualifications for ALJs (specifically, bar membership qualifications) after they have been hired by their respective agencies. It appears to me that this responsibility is vested in the employing agencies themselves, to be exercised in accordance with the different needs of their various subject matter jurisdictions. The NPRM relies on the 'clear intent of Congress' as the basis for this seemingly novel assertion of regulatory authority, but there is nothing I can find in the legislative history of the APA (Act of June 11, 1946) expressing this intent, which, apparently, has been less than clear for more than half

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CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE 119 (1997). Adjudication was assigned to the MSPB; OPM was given the authority to write and grade civil service examinations. At one time OPM, recognizing its special obligation under the Administrative Procedure Act to assure the independence of ALJs, maintained an Office of Administrative Law Judges (OALJ), which for some years was headed by an ALJ. When the political tides shifted, however, OALJ was abolished and its functions were downgraded and merged into the general civil service pool. Since then, OPM has consistently ignored calls to reinstate OALJ. *See, e.g.,* Letter of Administrative Law Judge Coordinating Council to Linda M. Springer (April 11, 2006) (on file with author).

> a century. Would you please cite more specific legal authority to demonstrate that this proposed regulation, and concomitant reversal of OPM policy, is not ultra vires?

In the final rule,[22] OPM acknowledges that "many commentators" challenged its authority to extend its jurisdiction over sitting ALJs but, not surprisingly, promulgates the rule anyway. Abandoning its reliance on the "clear intent of Congress", OPM cites various cases to prove that it has authority to establish examination criteria for initial appointment to the position of ALJ—a fact that was never in dispute—but (again not surprisingly, in view of the state of the law) it cites no precedent in support of the expansion of its power.[23] Indeed, the attempt to find statutory authorization for regulating the bar status of sitting judges would invite unflattering metaphors. As the D.C. Court of Appeals stated in *American Bar Ass'n v. FTC,* dealing with an analogous attempt by a federal agency to assert regulatory authority over the practice of law, "[t]o find this interpretation deference worthy, we would have to conclude that Congress . . . had hidden a rather large elephant in a rather obscure mouse hole. . . ."[24]

Accordingly, in lieu of any relevant legal authority, the final rule asserts that "this is not a new requirement but a clarification of a longstanding OPM policy that an administrative law judge must have an 'active' bar membership or current license to practice law."[25]

There are many problems with this assertion. First, of course, OPM cannot have a "policy" without the express statutory authority to regulate the issue.[26] OPM is not the judge of its own subject

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22. Office of Personnel Management, 72 F.L.R.A. No. 53, 12947 (March 20, 2007).

23. The APA specifically requires that the NPRM "give the legal authority for the rule." CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE § 4.6 (1997), citing *Attorney General's Manual.* Failure to cite the law is in itself a failure of notice. *Id.*

24. Am. Bar Ass'n v. FTC, 430 F.3d 457 (D.C. Cir. 2005), *cf* United States v. Locke, 529 U.S. 89 (2000).

25. Office of Personnel Management, 72 F.L.R.A. No. 53, 12950 (March 20, 2007).

26. This is, of course, black letter law. *See, e.g.,* CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE § 1.22 (1997).

matter jurisdiction, and its interpretation as to the extent of its power is entitled to no special weight.[27] As John Hart Ely famously noted, "public persons know that one of the surest ways to acquire power is to assert it." [28] Unfortunately for OPM, however, an agency cannot expand its jurisdiction by adverse possession.[29] This is particularly true where, as here, the OPM Regulation has the practical effect of encroaching on discretionary areas reserved to the states,[30] and interfering with the right and duty of other federal agencies with respect to the status qualifications of their own employees.

Secondly, the allegation of "a longstanding OPM policy" is simply untrue. This is a serious charge to bring against a federal agency but the following discussion will prove it in some detail. The proof will demonstrate, not only the *mala fides* of the Regulation, but its underlying flaws and deficiencies.

OPM POLICY

Prior to 1998, OPM's public statements not only lacked any expression of a policy favoring "active" bar membership; they were

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27. Although the general "question of whether *Chevron* applies to interpretations of the scope of an agency's 'jurisdiction' is somewhat unsettled", (DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2005-2006 64 n.33 (Jeffrey Lubbers ed., ABA 2006)) and the Circuits are in conflict, where, as here, the statute is unambiguous, the question simply does not arise. The Federal Bar Association, in its February 13, 2006 comments on the proposed rule, and other commentators, made the point that OPM has a *duty* to perform the regulatory activities mandated by statue, rather than *discretion* to do so.

28. JOHN HEART ELY, DEMOCRACY AND DISTRUST (Harvard Univ. Press 1980), *reprinted in* JOEL FEINBERG & HYMAN GROSS, PHILOSOPHY OF LAW 316 (1995).

29. *See, e.g.,* La. Pub. Serv. Comm'n v. FTC, 476 U.S. 355, 374 (1986) (a federal agency "literally has no power to act . . . unless and until Congress confers power upon it").

30. *See, e.g.,* Commodity Futures Trading Com. v. Schor, 478 U.S. 833 (1986). Although the OPM Regulation does not require state bar licensing agencies to define active status in a manner that will accommodate ALJs, the practical effect of the regulation will be to "dragoon" state bars into doing so. *Cf* Printz v. United States, 521 U.S. 898 (1997), *see also* Oregon v. Ashcrof, 368 F.3d 1118 (9th Cir. 2004). The Regulation has already caused considerable confusion in many state bars, as did the AGC opinion letters hereinafter described.

inconsistent with the existence of such policy.[31] Indeed, overlooking the limitations of OPM's jurisdiction, the ALJ community generally believed that, if OPM did have a policy, it was that continued bar membership was *not* required.[32]

On July 28, 1998, however, Rhoda G. Lawrence, an Assistant General Counsel for OPM, wrote a letter to Stuart Besser of SSA's Office of General Counsel. Mr. Besser had apparently asked OPM whether "Administrative Law Judges and Federal Government attorneys are required to maintain active state bar memberships,"

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31. The Comment submitted by the AALJ in response to the NPRM addresses this point in some detail (*see generally* the Comment submitted by the AALJ 11-13), but a few additional observations may be in order. In May 1989, OPM issued an "Administrative Law Judge Program Handbook" in which it explained the duties and responsibilities of both ALJs and OPM. The Handbook suggests no duty on the part of any ALJ to maintain any particular post-employment status, but claims for *OPM* the duty to maintain "liaison with professional bar associations to help recruit and retain well-qualified applicants and to encourage high standards of conduct and performance among Administrative Law Judges." (OPM's methods of "encouragement" and its right to undertake such "encouragement" are the topics under discussion here.)

In August 1994 OPM signed off on a revised Administrative Law Judge Position Description describing the duties and responsibilities of ALJs in great detail, but making no reference to any post-employment obligations imposed by OPM, with respect to bar status or any other issue. In May of the same year SSA issued an "ALJ Administrative Handbook" which states that *retired* ALJs who wish to participate in SSA's "Senior ALJ Program" must maintain "a current license to practice law" (i.e., an SSA, not an OPM policy, applicable only to retirees who wished to reenter service) but imposing no such requirement on sitting ALJs. To the contrary, the Administrative Handbook referred to the ABA Code of Judicial Conduct which provides that a "judge shall not practice law."

32. In January 1989, four months prior to publication the Program Handbook, James R. Rucker, Jr., Chief Administrative Law Judge of the Social Security Administration, by far the nation's largest employer of ALJs issued a memorandum to all SSA ALJs setting forth his understanding of the issue: "The Office of Personnel Management (OPM) does not require continued Bar membership once an individual is appointed to the ALJ position . . ." OPM never contradicted that statement, possibly because Judge Rucker erroneously assumed that OPM had statutory authority to impose such requirement if it chose to do so. Whatever OPM's motive, the statement was never retracted by either Judge Rucker or SSA. OPM's new Qualification Standard for Administrative Law Judge Positions, May 2, 2007, states that "[i]ncumbent ALJs must continue to meet" the pre-employment licensure requirement. U.S. Office of Personnel Management, *Qualification Standard For Administrative Law Judge Positions,* https://www.opm.gov/qualifications/alj/alj.asp.

thereby lumping them together in the same category.[33] There is, of course, no way for us to know what discussions preceded this inquiry. Instead of replying, as would have been appropriate, that the issue was onstitutionally reserved for consideration by the various state licensing authorities; that, in any event, the professional fitness of ALJs employed by SSA was for SSA, not OPM, to determine; and that OPM had no authority to express a legal opinion on the issue; Ms. Lawrence wrote the following:

> [Attorneys must] maintain good standing. This means that an attorney's membership in the bar must be such as to permit the attorney to practice law, whether or not it involves maintaining an 'active' status. We are aware of no jurisdiction in which an 'active' member is not regarded as authorized to practice law. Therefore, as a practical matter, OPM has advised agencies that their attorneys must maintain 'active' status. Attorneys who wish to maintain a status other than 'active' may do so, provided that the status they maintain entitles them to practice law. This would apply to such categories as 'judicial' or 'active non-resident' to give two examples that have been brought to our attention. . . . Administrative law Judges (ALJs) must meet the same professional licensing requirements as GS-905 attorneys. . . .[34]

As Ms. Lawrence's reference to "judicial" status, and a status "other than active" makes clear, OPM was *not* of the view that a status "such as to permit the attorney to practice law" meant that an ALJ needed to maintain a status that would permit the ALJ to practice law immediately, without further action on the part of the ALJ. The letter could only be read as meaning that the ALJ was *qualified to practice law* upon the performance of certain ministerial

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33. As Judge Wenzel points out in commenting on a draft of this article, "the underlying structural fault in OPM's approach to ALJ issues is that . . . OPM does not have [a separate] occupational title or series for administrative law judges."

34. E-mail from Rhonda G. Lawrence, Assistant General Counsel for OPM, to Stuart Besser, of SSA's Office of General Counsel (July 28, 1998) (on file with author).

acts within the ALJ's immediate control (electing active status, paying bar dues). It implies that the ALJ has not been disbarred or convicted of a crime. In short, her attempt to define the term not withstanding, the letter appears to mean that the ALJ satisfies Ms. Lawrence's fundamental requirement if the ALJ is in "good standing" with a state bar.[35]

While Ms. Lawrence's letter expressly denied that "active" bar status was the only status acceptable to OPM, it was extremely vague as to what statuses other than "judicial" or "active non-resident" would qualify.[36] Accordingly, in my then capacity as an officer of the AALJ, I wrote to her for clarification. Her response, dated January 7, 1999, was unhelpful:

> OPM recognizes that, as state bars create new bar membership classes, questions may arise whether membership in a particular class qualifies an individual to serve as an ALJ or attorney. As noted in my earlier letter, the burden is on the employee to show to his/her employing agency that a status other than "active" entitles that employee to serve as an ALJ or attorney.[37]

In other words: OPM requires a particular status, but will not say what status is acceptable and what status is not. In fact, OPM will not even decide the issue if it is presented (the issue is for the "employing agency", rather than OPM or the state bar licensing authorities). And, although OPM cannot state what it means by a status that "permits the [ALJ] to practice law", the burden is on the

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35. Ms. Lawrence illustrates a point once made by John Austin: "Terms that are largest, and therefore the simplest of a series, are without equivalent expressions into which we can resolve them *concisely*. And when we endeavor to *define* them, or translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions." John Austin, *The Province of Jurisprudence Determined*, Lecture 1 (1832).

36. E-mail from Rhonda G. Lawrence, Assistant General Counsel for OPM, to Stuart Besser, of SSA's Office of General Counsel (July 28, 1998) (on file with author).

37. E-mail from Rhonda G. Lawrence, Assistant General Counsel for OPM, to David J. Agatstein (Jan. 7, 1999) (on file with author).

ALJ to persuade his or her employing agency that he or she occupies that status.

Confused by this response, I wrote to Ms. Lawrence once again, asking for additional clarification. The reply came from her successor, Assistant General Counsel James F. Hicks. By letter dated February 11, 1999, Mr. Hicks stated, *inter alia*, that OPM "has not undertaken the task of a State-by-State survey of bar membership requirements and restrictions, nor does it intend to do so" and politely suggested that I direct any further inquiries elsewhere.[38]

The vague, contradictory, confused and confessedly un-researched opinions of two OPM Assistant General Counsel, however, do not establish OPM "policy", long standing or otherwise. Thus, in May 2000, the Director of OPM, Armando Rodriguez, sent the following email to Administrative Law Judge Bruce Birchman: "You are correct in that we do not require active bar membership for ALJs. The requirement applies to applicants and Senior ALJs. I believe I know where this came from and it was in error."[39]

A draft memorandum from R. Christina Espinosa-Ross, Deputy Director of OPM's Office of Administrative Law Judges, dated July 12, 2000, expresses a similar view.

The issue, however, had escaped into the air, and was not laid to rest by Mr. Rodriguez' communication. In August 2001, Jane E. Altenhofen, Inspector General for the NLRB, detected the existence of an OPM "policy," namely:

> that ALJs must be both licensed and authorized to practice law. The policy is based on two opinion letters issued by OPM's Office of General Counsel. Reliance on these opinion letters is problematic for two reasons. First, the courts have stated that such agency interpretations lack the force of law and do not warrant the same deference as formal rule making and actual adjudication. Second, there is no express directive in the current OPM Regulations requiring sitting ALJs to be active members of a bar, while there

38. E-mail from James F. Hicks, Assistant General Counsel for OPM, to David J. Agatstein (Feb. 11, 1999) (on file with author).

39. E-mail from Armando Rodriguez, the Director of OPM, to Judge Bruce Birchman (May 2000) (on file with author).

> are regulations [that] require active membership of ALJ applicants and retired ALJs who are recalled to Federal service.[40]

In December, 2005, OPM finally settled on a "long standing" policy. Obviously recognizing that opinion letters have, at best, an *in terrorem* effect,[41] and desiring to clear up the muddle created by its earlier pronouncements, OPM issued a NPRM.

The final regulation was promulgated fifteen months later, on March 20, 2007.[42] Notwithstanding the history just described, the

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40. Opinion letter from Jane E. Altenhofen, Inspector General for the NLRB (Aug. 2001) (on file with author).

41. Christensen v. Harris Co., 529 U.S. 576 (2000); Bowler v. Hawke, 320 F.3d 59 (1st Cir. 2002).

42. APA Violation. Adoption of the Regulation also violated the Administrative Procedure Act. The Association of Administrative Law Judges filed an exhaustive comment on the proposed regulation, drafted by Judges Larry J. Butler and William A. Wenzel. The AALJ cited Meeker v. OPM, DC-300A-98-0467—2 (1998), in which an attorney employed by OPM applied to be placed on the ALJ register. OPM denied the application on the grounds that Meeker had not maintained "active" status as a licensed attorney for the seven year period immediately prior to his application. An ALJ for the M.S.B.P. concluded, however, that OPM violated its own rules in not having documented that the "active bar membership" requirement was based on a job analysis and shown to have a rational relationship to job performance. The AALJ pointed out that the bar status regulation is similarly unsupported. In response to this comment, the final rule mentions, for the first time, studies by "OPM's Research Psychologists" who concluded that "Integrity/Honesty is fundamental for performing the duties of an administrative law judge." These studies, however, were directed to the pre-employment qualifications of prospective ALJs and, accordingly, have nothing to do with the issue at hand. (I am sure that all would agree that ALJs—and regulators as well—should be honest.)

Referring to the psychological studies, the AALJ noted in its subsequent District Court Complaint challenging the regulation, AALJ v. OPM, Dist Ct. D.C., Case No. 07-0711 (RMC), that OPM attempted to rely upon material that was not included in the NPRM, and upon which the public had no opportunity to comment. More tellingly, OPM may have attempted to avoid notice entirely, by publishing the Regulation under the obscure and uninformative title *Examining Systems and Programs for Specific Positions and Examinations (Miscellaneous)*. *See* CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE §§ 4.4, 4.6 (1997). More tellingly still, in the face of the many defects identified by the public in response to the NPRM, OPM promulgated the final regulation without changing a single word of the licensure provision. From these facts, an impartial observer may decide whether OPM complied with the notice and comment provisions of the

final rule states that, because "it is not a new requirement, a transition period is not needed."[43] Indeed, the Regulation is offered as a "condition of employment" thereby ostensibly allowing OPM to remove non-compliant ALJs without the procedural safeguards contained in the APA.[44] The Regulation does not say whether this "condition of employment" is a new requirement or not.

B. The Regulation Violates Due Process

EXCEPTIONS TO ACTIVE STATUS

Not surprisingly, many highly critical comments were submitted to OPM in response to the NPRM.[45] With respect to the "judicial exception" one commentator wrote:

> The words "in States that prohibit sitting judges from maintaining 'active' status to practice law" should be omitted, and additional clarification added, so that the sentence reads, in substance, "Judicial status is acceptable in lieu of 'active' status, in states that accord judicial status to ALJs." It is not necessary that a state prohibit a judge from maintaining active status, because most full time judges (and all federal ALJs) are prohibited from practicing law in any event, and, more importantly, because judicial status means that the individual is within the ambit of the state's licensing authority. Indeed, the ethical standards for judges are, if anything, higher and more exacting than those for attorneys. Accordingly, the interests of the

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Administrative Procedure Act, 5 U.S.C. § 554. Compliance requires that the government consider the comments with an open mind and modify its proposed regulation accordingly. *See, e.g.,* Nat'l Ass'n of Indep. Television Producers v. FCC, 502 F.2d 249 (2d Cir. 1974); KOCH § 4.15.

43. Office of Personnel Management, 72 F.L.R.A. No. 53, 12949 (March 20, 2007).

44. Final Rule 930.211(C)(1) purports to exempt OPM actions from 5 U.S.C. § 7521; *cf.* Perry v. Sinderman 408 U.S. 593 (1972).

45. The comments are summarized in the final rule. OPM has provided this writer with copies of the public comments, but not the comments submitted by other agencies, claiming an exemption under FOIA.

> federal government in maintaining professional standards for ALJs, as embodied by the proposed OPM Regulation, are fully satisfied—indeed, better satisfied—by judicial rather than active status.[46]

The same commentator suggested that the Regulation be clarified

> to make it explicit that one may be in "good standing" with the bar while in "inactive" status. . . . An ALJ who has been disbarred, or who has surrendered a law license in lieu of disbarment, is not in good standing, and, in addition, is not subject to further direct bar discipline. An "inactive" bar member is nevertheless a member of the bar, and may be disbarred for, e.g., unauthorized practice. . . .[47]

Both of these arguments were rejected by OPM on the grounds that they do not promote "the efficiency of the competitive service,"[48] without further explanation. I would contend,[49] by contrast, that the arguments, although eloquently presented, are mistaken for different reasons entirely. First, they are parochial; they assume, for example, that the licensing state has both "active" and "inactive" categories, and that the licensing state does not consider judging to be the practice of law.[50]

PROCEDURAL DUE PROCESS

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46. In this regard, I note that because the requirements for "active" status are addressed to the tensions that arise in the practice of law, and because ALJs do not practice law, the requirement for "active" status is a poor proxy for ALJ-specific professional standards, such as a Model Code of ALJ Conduct.

47. On this issue, another commentator cited *Matter of Maroney,* 259 A.D.2d 206 (N.Y. App. Div. 1999).

48. Office of Personnel Management, 72 F.L.R.A. No. 53, 12949 (March 20, 2007).

49. Although my personal involvement in the events described ends at this point, in order to present my arguments simply and clearly I will continue to use the first person singular.

50. *See* Tennessee rule, *supra; cf.* Gazan v. Heery, 183 Ga. 30 (1936).

In addition, and much more fundamentally, the comments imply that it would be unobjectionable for OPM to require that ALJs be within the jurisdiction of state disciplinary boards. However, even states that consider judges to be active bar members are careful to remove them from the disciplinary purview of the practicing bar. For OPM to impose bar status requirements that are inconsistent with the regulatory framework laid out by the individual states, by requiring ALJs to have a current license to practice law without regard to the safeguards of judicial independence embodied in the state's law, OPM violates one of the most basic tenets of due process—that no person be a judge in his or her own case.[51] This becomes obvious when one considers the origin and purpose of the Due Process Clause, as explained in the following paragraphs.

If the OPM Regulation were given its intended reading and effect, ALJs, as active bar members in states where that classification is not intended for judges, would face the possibility of discipline by tribunals established, consisting or controlled by the professional organizations that represent the lawyers who practice before ALJs. This was the precise issue confronted and condemned by Sir Edward Coke in *Dr. Bonham's Case*[52]—a leading authority and still very much a part of American Constitutional law.[53] Although the courts have "generally . . . agreed that . . . a sitting judge cannot be disbarred for a violation of the prohibition [against practicing law] since to allow a disbarment would be effectively to confer on the bar

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51. In other words, due process requires that ALJs be independent of the bar. ALJ independence also protects the role of the Article III judiciary. As Peter H. Russell states in his essay, *Toward a General Theory of Judicial Independence*, "one way of undermining judicial independence is to transfer judicial functions from a judiciary enjoying a high degree of autonomy to officials and agencies having very little independence." PETER H. RUSSELL, TOWARD A GENERAL THEORY OF JUDICIAL INDEPENDENCE, *in* PETER H. RUSSELL & DAVID M. OBRIEN, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 8-9 (Univ. Press of Virginia, 2001). This provides at least a partial answer to Professor Moliterno's article, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, *reprinted in* 27 J.NAALJ 53 (2007).

52. Dr. Bonham's Case, 77 Eng. Rep. 652 (1610).

53. JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 18 (2003).

association the power of removal."[54] This same position is given its fullest implementation in cases such as *In Re Meraux,*[55] where the regulation exposes ALJs to the potential necessity of defending against that charge or other charges that may be brought before bar disciplinary committees.

Accordingly, one contemporary authority on legal ethics, discussing lawyer discipline in general, noted that lawyer registrations systems (described *supra* p. 45) include disciplinary structures that hold "the promise of greater independence from the state bar"; nevertheless, "in operation most courts in registration states give the state bar association a strong role in selection of the members for disciplinary agencies" [56] and other related powers. If, as the author of this quotation implies, the due process issue is troubling in the case of lawyers disciplining lawyers (because of the tribunal's presumed lack of impartiality), the problem is much worse in the case of lawyers disciplining judges.[57] For this reason, the ABA Model Rules for Lawyer Discipline[58] exempt judges from the jurisdiction of lawyer disciplinary agencies. Apparently for this reason as well a number of federal district court judges have exempted themselves from membership in the state's mandatory bar.[59]

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54. Michael A. Rosenhouse, *Validity and Application of State Statute Prohibiting Judge From Practicing Law*, 17 A.L.R.4th 829 (2006) (citing State Bar v. Superior Court of L.A. County, 207 Cal. 323 (1929), and Re Silkman, 88 App. Div. 102 (1903)).

55. In re Meraux, 202 La. 736 (1943); *see also* Re Jones, 202 La. 798 (1943); both cited in 57 A.L.R.3d. 1150.

56. CHARLES W.WOLFRAM, MODERN LEGAL ETHICS 45 (1986).

57. Viewed from this perspective, the holding of the District Court in *Meza v. Massanai,* 199 F.R.D. 573 (S.D. Tex. 2001) (that an ALJ's inactive bar status in California did not deprive the claimant of due process) was correct, but for reasons that the court did not mention, namely, that inactive bar status was entirely appropriate. *Cf.* State Bar v. Superior Court of L.A., 207 Cal. 323 (1929), *infra* note 54. I would contend, given the state of California law, that inactive status is constitutionally mandated. A similar point was made by the Energy Bar Association in its February 2, 2006 comment on the proposed rule.

58. Rule 6C. Rules adopted by ABA House of Delegates August 11, 1993, and amended thereafter.

59. It has been difficult to document this reasoning. For example, while a number of federal district court judges in the Eastern District of North Carolina did decide that they were not required to belong to that state's mandatory bar, and resigned from the bar, their reasoning has not been made available. Chief United

To restate this point, the licensing of attorneys is a state function. If a state requires a judge to assume a bar status inconsistent with judicial independence, the judge must opt out, on federal Constitutional grounds. A federal regulation that requires a federal ALJ to assume an inappropriate state bar status—even if the state agrees to confer the status—is two steps removed from Constitutional validity. This would be true even if the regulation had a statutory foundation.[60]

C. The Regulation is Inconsistent with Federalism

As the Supreme Court has noted: "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."[61] As recently as 2002, the American Bar Association rejected a proposal that there be a single, nationally

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States District Court Judge Louise W. Flanagan, in a letter to author, dated August 9, 2007, states that she consulted with her colleagues and, "[a]s with me, a myriad of considerations [bearing on the issue] revealed themselves." While Judge Flanagan did not identify any of the considerations, she did not deny the suggestion, contained in my letter of inquiry, that it included procedural due process. Similarly, District Court Judge Alex R. Munson of the Northern Mariana Islands informed me, through his law clerk, that he had been advised to go inactive or resign from the bar when he was appointed to the bench (*see* Appendix). As of the date of this writing, an inquiry of the Administrative Office of the U.S. Courts has not been answered.

60. Substantive Due Process Violation. While the procedural due process violation just described is based upon ancient authority, a substantive due process denial can be argued on the basis of this novel legal idea: ALJs have a liberty interest in exercising the qualified judicial independence guaranteed by the Administrative Procedure Act—an interest that serves to protect the more fundamental interests of litigants and the public. *Cf.* Bd. of Regents v. Roth, 408 U.S. 564 (1972). There is little doubt that litigants have a property interest in the entitlements at issue in some administrative proceedings. Mathews v. Eldridge, 424 U.S. 319, (1976). If this is correct, by randomly interfering with ALJs' qualified judicial independence and impartiality, as discussed *infra,* without advancing a legitimate federal objective, the OPM Regulation falls on every prong of a Fifth Amendment substantive due process denial of liberty and property. *See, e.g.,* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (Aug. 2000); *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1994).

61. Leis v. Flynt, 439 U.S. 438, 442 (1979).

recognized law license.[62] While Chief Justice Burger, among others, would have based the allocation of authority on the Tenth Amendment ("the States reserved, among other powers, that of regulating the practice of professions within their borders"),[63] the reserved powers amendment is not presently in vogue as a source of constitutional law. Some states (Utah, Connecticut) exempt all federal judges, even all federal lawyers (Alaska), from state licensing laws,[64] but (subject to the obligation of a judge opt out for reasons of procedural due process, and similar considerations) the principle expounded by the Supreme Court of Mississippi is undoubtedly correct: "a state's authority regarding an attorney's license to practice law is not preempted by the Federal Constitution, notwithstanding that the licensed attorney may also be a federal judge."[65]

The problem of federalism arises, of course, when a judge's obligation under the OPM Regulation is inconsistent with state law. Consider the following hypothetical—a classic example of "conflict preemption".[66]

A state is concerned about the number of lawyers who discontinue practice to become hedge fund managers, law professors or restaurateurs. Accordingly, it adopts a rule to the following effect: in order to maintain a license to practice law one must, with specified regularity, either appear before a court or other tribunal as an advocate for a client, or render legal advice in writing to a client for a fee. That rule would create an insoluble dilemma for federal administrative law judges who, as discussed below, are prohibited from practicing law on pain of removal from office.[67] The fact that a state is unlikely to enact the hypothetical rule does not remove the offense to federalism, for at least two reasons: (1) the OPM Regulation occupies an area reserved for state regulation (bar membership) and is thus proscribed by the "Dormant Commerce Clause" line of cases,[68] and (2) as a practical matter, it has the effect

62. Chicago Daily Law Bulletin (Aug. 13, 2002).

63. In Re Griffiths, 413 U.S. 717, 730 (Burger, C.J., dissenting).

64. *See* Appendix.

65. State Bar v. Nixon, 494 So. 2d 1388 (Miss. 1986).

66. *Id., cf.,* Collins v. DOJ, 94 M.S.B.P. 62 (2003).

67. *See infra.*

68. *See, e.g.,* JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW, 87 (2006), Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d. 316,

of obliging state bars to adopt rules in conformity with its terms, "dragooning" them into compliance.[69] As FORUM observed, the Regulation[70]

> intrudes on matters entrusted to the States and territories. [It] would make OPM a "super" licensor for all state and territorial jurisdictions. It would override and/or create conflicting new licensing requirements and cause ALJs to be in violation of their ethical obligations under the Judicial Code of Conduct.[71]

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345 (4th Cir. 2002); Gillian E. Metzger, *Congress, Article IV and Interstate Relations*, 120 HARV. L. REV. 1468, 1513 (Apr. 2007).

69. Commodity Futures Trading Com. v. Schor, 478 U.S. 833 (1986). Note that a specific expression of intent to preempt not required for conflict preemption. Geier v Honda Motor Co., 529 U.S. 861 (2000).

70. Comment dated January 24, 2006. As the Supreme Court noted in 1947, referring to the preclusive effect of an Act of Congress (which is generally entitled to greater preclusive effect than a regulation, Hillsborough v. Automated Med. Lab., 471 U.S. 707, 717 (1985)) the question is whether the federal interest "is so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject." Rice v. Santa Fe Elevator, 331 U.S. 218 (1947). With regard to state bar regulation, the federal interest is clearly not so dominant.

71. Void for Vagueness. In addition, with respect federal-state relations the Regulation is hopelessly vague. It would not be vague if it simply required Judges to comply with state law but, if that were its intent, it would be superfluous as well as *ultra vires*. The Regulation purports to supersede state law, at least in part, but the resulting amalgam of state and federal law is incoherent. The primary mandate of the Regulation, contained in the first sentence, is couched in terms of uniform and universal federal preemption, but the exceptions defer to state licensing authorities with respect to such categories as "active" and "current license to practice law". The problem, however, is that these are OPM's terms and are not necessarily used by the states themselves. As a result, states with substantially identical rules may interpret the OPM Regulation quite differently, and, in fact, have already done so. Compare the opinion of Christopher L. Slack, First Assistant Bar Counsel of Connecticut:

> In response to your inquiry, please know that Section 2-27(d) of the Connecticut Practice Book specifically exempts federal judges (including magistrate judges, administrative law judges and bankruptcy judges) from the annual registration requirement imposed upon attorneys admitted in Connecticut. However, aside from this, I am not aware of any rule or provision which

D. The Regulation is Irrational: Judges Do Not Practice Law

The Regulation requires that ALJs have a "current license to practice law", but in most states judging is not considered to be the practice of law, and most judges are prohibited from engaging in the traditional practice of law. Indeed, with minor exceptions, the "practice of law by full time judges ['office practice as well as

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> would otherwise alter the status of such judges, so they would probably be considered "active" for the purposes of your survey.

with that of Bedford T. Bentley, Jr., Secretary of the State Board of Law Examiners of Maryland:

> A state judge is continued on the roll of attorneys maintained by the Court of Appeals of Maryland (Maryland's highest court), but may not engage in the practice of law, and is exempt from paying the mandatory assessment required of all practicing attorneys. (Maryland does not have a unified bar—membership in the Maryland State Bar Association is voluntary.) In effect, a judge is "inactive," which is the status of an attorney on the roll of the Court of Appeals of Maryland who elects not to pay the Client Protection Fund assessment because he or she is not engaged in the active practice of law in Maryland.

How should the ambiguity be addressed? While a federal court could, of course, defer interpretation of the Regulation to the respective states, that approach would require every state and territorial licensing board to construe the Regulation in the context of its own law, with inevitable inconsistencies, and would promote disagreement and litigation in many if not most jurisdictions. (*See generally* George V. Burke, Annotation, *Supreme Court's Definition and Application of Doctrine of "Abstention" Where Questions of State Law are Controlling in Federal Civil Case*, 58 L. Ed. 2d 862). A federal court might attempt to make sense of the regulation without rewriting it, but that attempt would be fraught with problems, particularly inasmuch as bar status and licensing implicate issues of liberty, property, speech and association that are beyond the scope of the present article. (*See generally* Romualdo P. Eclavea, Annotation, *Supreme Court's Application of Vagueness Doctrine to Noncriminal Statutes or Ordinances*, 40 L.Ed. 2d 823). OPM itself does not employ administrative law judges and leaving the task of construing the Regulation to agencies that do would appear to be an unwarranted delegation of judicial authority: experience suggests that the construction given by federal agencies would be no more rational or fair than judicial construction. Accordingly, with respect to interpretation of the regulatory language only, the wisest and simplest course would be to declare the Regulation void for vagueness, and let OPM try again, after informing itself of the diversity of state law summarized in the Appendix.

courtroom practice']"[72] has long been prohibited in every American jurisdiction;"[73] in some states it is a crime.[74] As one commentator explained:

> Canon 4G of the 1990 American Bar Association Model Code of Judicial Conduct prohibits full-time judges from practicing law, and all states have similar or identical restrictions. The comparable prohibition in the 1972 model code was enacted because the 'likelihood of conflicts of interest, the appearance of impropriety, and the appearance of lack of impartiality—all have their greatest potential in the practice of law by a full-time judge.'[75]

Although federal ALJs are presently classified under Article I of the U.S. Constitution, there is little doubt that the prohibition against practicing law applies to them. As in the case of *Butz v. Economou*,[76] the relevant consideration here is judicial *function.*[77] After a long and not unopposed history,[78] federal administrative law judges are now authoritatively recognized as functionally equivalent to trial courts.[79]

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72. MARVIN COMISKY & PHILIP C. PATERSON, THE JUDICIARY: SELECTION, COMPENSATION, ETHICS AND DISCIPLINE (1987).

73. SHAMAN, ET AL., JUDICIAL CONDUCT AND ETHICS 238 (3rd ed. 2000).

74. *E.g.*, ALA. CODE § 34-3-11 (2007).

75. JUDICIAL CONDUCT REPORTER (Spring 1999) (citing E. WAYNE THODE, REPORTER'S NOTES TO [1972] CODE OF JUDICIAL CONDUCT 91 (ABA 1973)).

76. Butz v. Economou, 438 U.S. 478 (1978); *see also* R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002).

77. "The 'judiciary' for whom judicial independence is a defining normative expectation are the officials and institutions that perform the central judicial function of adjudication. . . . [Adjudication] is the provision of authoritative settlements of disputes about legal rights and duties." Peter H. Russell, Toward a General Theory of Judicial Independence, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 8-9 (Univ. Press of Virginia, 2001).

78. *See, e.g.*, Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128 (1953), SCHWARTZ, ADMINISTRATIVE LAW CASEBOOK 423 (1977), MULLINS, op cit, KOCH, op cit.

79. As one authority expressed it, federal administrative law judges now "have much the same status and perform the same functions as trial judges. . . . In accordance with their status, they are paid at the top of the government pay scale

Indeed, as the Supreme Court flatly stated in 2002, the similarity between administrative law judge proceedings and civil litigation in Federal District Court is "overwhelming".[80]

Moreover, the Administrative Procedure Act, which is directly applicable, prohibits ALJs from performing "duties inconsistent with their duties and responsibilities as administrative law judges" Accordingly, the APA can also be read to proscribe activities that give rise to the appearance of impropriety and lack of impartiality.[81]

In those rare instances where ethics problems have arisen, OPM itself has applied the ABA Code of Judicial Conduct to federal administrative law judges.[82] Thus, in 1993, the practice of law by an administrative law judge resulted in his dismissal.[83] And in at least one jurisdiction, "[i]f a judge were to maintain his or her active status, he or she could be accused of holding out as authorized to practice law, thus violating Virginia's Unauthorized practice of Law Rules.[84] Accordingly, as noted by a commentator quoted above, while it would be rational to insist that judges be competent in the law, the OPM Regulation is not rationally related to that ideal; indeed, it is irrational to require that all administrative law judges in every jurisdiction submit to licensing requirements that may impose

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and their pay is protected." CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE 435-36; (1997); *see also* MULLINS, 1-2.

80. FMC v. S. C. Ports Auth., 535 U.S. 743, 759 (2002).

81. *See* 5 U.S.C § 3105. A similar point was made by the Federal Bar Association in response to the NPMR.

82. *E.g.,* In the Matter of Chocallo, 1 M.S.P.R. 605 (1978), *aff'd.,* 1 M.S.P.R. 612 (1980). The ABA Model Code of Judicial Conduct for Federal Administrative Law Judges (February 1989) Canon 5(f) states flatly: "An administrative law judge should not practice law."

83. SSA v. Whittlesey, 59 M.S.P.B. 684 (1993). The decision relies both on the American Bar Association (ABA) Code of Professional Conduct (which, since February 2007 expressly applies to ALJs [I.(B)]) and on the SSA Guide on Employee Conduct, which, in Part VII, Section I, imposing restrictions on administrative law judges noted: "an appearance of impropriety and, in many cases, of conflict of interest is created when an individual acts as an advocate in disputes between parties who may later appear before the individual acting as an ALJ." *See also* MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES CANON 2 (ABA 1989).

84. MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES CANON 2 (ABA 1989).

demands inconsistent with the responsibilities of their office. To emphasize, administrative law judges do not practice law.

E. The Regulation is Arbitrary

The NPRM comments of another judge, raising issues not yet discussed, is worth quoting at length, not least because of its reasonable tone:

> I was hired in 1994 and converted my attorney license to "Restricted" status (Minnesota) based on the information I then had that we did not have to maintain a "practicing" license. I know many other Judges took similar actions depending on their state of licensure. Restricted means I can represent immediate family but am forbidden from any form of "public" practice. I still pay the "practicing" judge or attorney annual license fee. In order to convert back to "active" status, I can be required to take up to 90 hours of CLE after reapplication to the CLE Board. This, of course, could be extremely onerous and expensive. Most of this would have to be done on annual leave. Because Minnesota has a very stringent "in-house" course prohibition (Rule 5 of the MN CLE Board Rules) it is questionable whether the courses offered at the ALJ conference would be approved for credit.
>
> The reason I am pointing out the Minnesota criteria is that if we are all required to reactivate, what everyone will have to do will vary greatly depending on the state they are, or were, licensed in. Many Judges no longer have ANY connection to the state they are (were) licensed in and it would not make much sense to comply with that state's requirements. What will result if reactivation is required is very disparate treatment depending on one's current "non-active" status and the state of licensure. Some Judges would have a very minimal upgrading requirement which would involve only paying a licensure fee. Some have

> "judicial" status and because they are no longer in the state of licensure, they have no on going CLE requirement. . . .[85]

These practical considerations, however, should not obscure the fact that the Regulation, as previously discussed at length, adversely affects a matter of vital public importance: the impartial administration of justice.

Meeker v. OPM[86] notwithstanding, in this age of multi-state practice it is at least possible to imagine a rational basis for the requirement that government attorneys, particularly litigators, maintain active bar membership. A requirement that ALJs know the law of the state in which they sit would also be rational: Social Security ALJs, for example, frequently interpret state laws pertaining to domestic relations, intestate succession and property.[87] A requirement that ALJs be licensed in that state, however, would be disruptive, to say the least. Perhaps (because Social Security ALJs' control the distribution of benefits in a non-adversarial proceeding) SSA has sought to shelter them from undue pressure by assigning them to jurisdictions far removed from their former colleagues and partners. For whatever reason, ALJs are often, if not usually, admitted to practice in one state and serve in another.

What rational basis underlies OPM's requirement that an ALJ, sitting in one state, be an "active" member of the bar of another state, perhaps thousands of miles away? How is "active non-resident status", where it exists, superior to the "inactive" status recognized by other states?[88] What is wrong with simple good standing in such bar status as the licensing state deems appropriate?[89] The final regulation does not say.

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85. Letter from Judge (on file with author).

86. Meeker v. OPM, DC-300A-98-0467—2 (1998).

87. *See, e.g.*, 20 C.F.R. § 404.330, 20; C.F.R. § 404.350, 20; C.F.R. § 416.1201.

88. "No constitutional or legislative purpose directed to establishing a threshold test of competency is to be served by requiring 'active' as contrasted with 'inactive' membership in the bar." In re Dalthorp, 598 P.2d 788 (Wash. App. 1979).

89. "Although Art. 6, Section 28 of the Arizona Constitution prohibits the practice of law by a 'judge of any court of record,' this does not mean that a judge

The difference in impact upon the thousand plus ALJs affected by the regulation is significant: ALJs licensed in some states (e.g., California, New York), if electing "active" status, must pay hundreds of dollars of bar dues annually, while ALJs licensed in other states (e.g. Vermont, Virginia) are totally exempt from bar dues—even though they may all live and work in Alaska. Other potential burdens (for example, contributions to client protection funds), while not itemized in this article, vary from state to state.

Nowhere—in its many pronouncements leading up to the final rule or in the final rule itself—does OPM identify any problem the active bar membership rule was intended to remedy. In fact, there was no problem other than OPM's own involvement in the issue. Even if there had been a problem (as the AALJ points out in its comment), OPM was obliged to "examine the relevant data and articulate a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made";[90] and a court "may not supply a reasoned basis for the agency's action that the agency itself has not given."[91] Thus, in addition to the other fatal defects discussed in this article, the absence of a researched and demonstrated rational basis for the bar membership requirement renders the final rule arbitrary, capricious and an abuse of agency discretion.

IV CONCLUSION

By conflating the role of attorney and judge the final regulation does much to undermine the principle of judicial independence set forth in the APA. The Regulation is invalid for multiple reasons, eight of which (*ultra vires,* procedural due process, federalism, substantive due process, arbitrariness, irrationality, vagueness and the

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need not remain in good standing with the Bar when he becomes a judge." In re Riley, 691 P.2d 695 (Ariz. 1984).

90. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156 (1962)).

91. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); *see also* Prinz v. United States, 521 U.S. 898 (1997); Gillian E. Metzger, *Congress, Article IV and Interstate Relations,* 120 HARV. L. REV. 1468, 1513 (April 2007) (discussing "dormant commerce clause" issues).

bona fides of OPM's participation in the administrative rule making process) are discussed in the preceding pages.

Long before they were granted the title of administrative law judges, hearing examiners strove for the greater professionalism, higher ethical standards, and enhanced public service that can only be attained through judicial independence.[92] For decades, organizations such as National Association of Administrative Law Judges, the ABA National Conference of Administrative Judges, and the Association of Administrative Law Judges have sponsored codes of judicial ethics for administrative law judges,[93] published educational journals and conducted periodic seminars of continuing judicial education—seminars for which the judges themselves, rather than their employing agencies, have born the bulk of the cost. What is needed, if the administrative judiciary is to continue on the path of improvement, is not the confusion of roles inherent in the new regulation. At the very least, it is freedom from abuses such as those described in this article.

Courageous judges—and there are a few—who insist upon maintaining an appropriate bar status despite the OPM Regulation are at risk of selective removal proceedings: those suspected of some non-existent or un-provable wrongdoing, or who are out of favor with the agency for some other reason, are most likely to be targeted.[94] For these reasons, among the many others discussed herein, the AALJ was correct in undertaking preemptive litigation.

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92. *See* Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128 (1953).

93. *See, e.g.,* Patricia E. Salkin, *Modern Ethical Dilemmas for ALJs and Government Lawyers*, 11 WIDENER J. PUB. L. (2002) (that a judge need not remain in good standing with the Bar when he becomes a judge). *See also* In re Riley, 691 P.2d 695 (Ariz. 1984).

93. *See supra* note 91.

93. *See* Ramspeck v. Fed. Trial Exam'rs Conference, 345 U.S. 128 (1953).

93. *See, e.g.,* Patricia E. Salkin, *Modern Ethical Dilemmas for ALJs and Government Lawyers*, 11 WIDENER J. PUB. L. (2002).

94. In addition, disappointed litigants may be expected to attack the legitimacy of decisions by ALJs who fail to maintain the prescribed bar status. As noted in the discussion of procedural due process, *supra*, this was tried without success in a Social Security proceeding: the District Court refused to hold that an ALJs inactive California status invalidated his decision. Meza v. Massanai, 199 F.R.D. 573 (S.D. Texas). Although the Court did not address the point, I contend,

The AALJ endorses the concept that all ALJs be in "good standing" with their respective bars. While this concept is praiseworthy, in some states "good standing" is a term of art. In the opinion of the present writer, OPM should not attempt to regulate the bar status of sitting judges at all. Rather, a court should declare that it is the responsibility of state licensing authorities to create the safeguards and firewalls necessary to preserve judicial independence, and, in so doing, to make a determination, subject to judicial review, of "what constitutes an appropriate bar status for sitting federal administrative law judges".[95]

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for reasons discussed above at length, that the ALJ's inactive status was not only appropriate, but may have been constitutionally mandated.

95. Comment dated December 19, 2005.

APPENDIX:

Compendium of State and Territorial Rules Pertaining to the Bar Status of Federal Administrative Law Judges

A. Mandatory State Bars

ALABAMA – MEMBER OF THE STATE BAR

"All lawyers who are qualified to practice law in Alabama and who are not engaged in active practice because they are holding a state or federal office that precludes them from practicing law may become members of the Alabama Bar Association by paying directly to the secretary of such association an annual sum equal to 50 percent of the money collected by the State of Alabama from a lawyer as a privilege license tax to engage in the practice of law. Upon payment of said sum as prescribed in the preceding sentence, such persons shall be entitled to all the privileges and benefits common to other members of such association." ALA. CODE § 34-3-17.

"Inactive"

"An attorney who chooses not to purchase an occupational license or pay special membership dues will be removed from the Alabama State Bar roll of attorneys in good standing. Those in this status are not considered members in good standing. At the present time, an attorney may reactivate his/her membership at any time by paying either of the above membership fees."

Alabama State Bar, *Membership Status Information, available at* http://www.alabar.org/members/information.cfm.

ALASKA – ALL FEDERAL LAWYERS EXEMPT*

State judges are required to be active members of the bar; "Inactive membership in the Alaska Bar is limited to members who no longer engage in the practice of law or hold judicial office or any other legal position in the State of Alaska." ALASKA BAR ASS. BY LAWS art. II, § 1(a). However, federal judges in Alaska are not required to be Alaska bar members. "The federal government can set its own requirements for persons serving as federal judges, magistrates, US attorneys, military lawyers, administrative law

judges, etc. They are not bound by state licensing requirements." Email from Deborah O'Regan, Executive Director, Alaska Bar Association (July 3, 2007).

ARIZONA – JUDICIAL STATUS

"Classes of Members. Members of the state bar shall be divided into five classes: active, inactive, retired, suspended, and judicial. A disbarred person is not a member." ARIZ. SUP. CT. R. 32(c) 1. "An active member who has retired from or is not engaged in practice in Arizona may be transferred to inactive status upon written request to the executive director. Inactive members shall not practice law in Arizona . . ." ARIZ. SUP. CT. R. 32(c) 4. "Judicial members shall be justices of the Supreme Court of Arizona, judges of the Court of Appeals and Superior Court of Arizona and of the United States District Court for the District of Arizona. Judicial membership status shall likewise be accorded to members of the state bar who are full-time commissioners, city or municipal court judges, judges pro tempore or justices of the peace in the state of Arizona not engaged in the practice of law, or justices or judges of other courts of record of the United States or of the several states. . ." ARIZ. SUP. CT. R. 32(c) 5.

"Practice of law" in Arizona is defined to include "Preparing or expressing legal opinions" but the definition does not expressly include adjudication. ARIZ. SUP. CT. R. 31 A. "Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar." ARIZ. SUP. CT. R. 31 D(b). "Nothing in these rules shall prohibit an officer or employee of a governmental entity from performing the duties of his or her office or carrying out the regular course of business of the governmental entity." ARIZ. SUP. CT. R. 31 D(d) 23. Arizona has an elaborate system of state administrative adjudication in which both lawyers and non-lawyers are, in specified instances, authorized to participate.

Judge Michael Cianci, a Judicial member of the Arizona bar confirms the accuracy of this information, but reports that the issue is unsettled, apparently by reason of the OPM Regulation. Email from Judge Michael Cianci (September 8, 2007).

CALIFORNIA – INACTIVE STATUS

"Every person admitted and licensed to practice law in [CA] is and shall be a member of the State Bar except while holding office as a judge of a court of record." CAL. CONST. art. VI, § 9 (2007). The available statuses for members of the state bar are "active" (defined as members "who are eligible to practice law in California"), "inactive" (who may transfer to "active" status at any time upon request), "not eligible", "resigned" and "disbarred." An ALJ may enroll as an inactive member if he or she is not otherwise engaged in the practice of law. CAL. STATE BAR RULES & REGS § 2. Bar dues are reduced for inactive members. ALJs are exempt from CLE requirements. "MCLE Rules and Regulations 6.1.5 State and Federal judges who are appointed pursuant to judicial article authority are exempt from membership in the State Bar during their continuance in office. *See* CAL. BUS. & PROF. CODE § 6002; CAL. CONST. art. VI, § 9. We list their status as "JUDGE" in our membership database." Email from Dina DiLoreto, Director of Administration, Member Services, The State Bar of California (May 4, 2007).

DISTRICT OF COLUMBIA – JUDICIAL STATUS.

Three classes of membership: active, inactive and judicial. Inactive and judicial members are not eligible to practice law in D.C. The annual dues is reduced for inactive members and further reduced for judicial members. After a series of policy changes instigated by OPM in 2000, the rules were amended (effective July 1, 2001) to state that ALJs "shall be classified as judicial members, except that if a member's terms and conditions of employment require that he or she be eligible to practice law, then the member may choose to be an active member." D.C. BAR R. 2 § 4.

FLORIDA – ACTIVE STATUS

Judges maintain active status. Fl. Rules and Regulations of the Bar, R. 1-3.1. Email from Johnny M. Smith, Assistant Director-Finance, Florida State Bar, May 8, 2007.

GEORGIA -- [unclear: no response to inquiry]

"All lawyers who are neither engaged in the practice of law nor holding themselves out as practicing attorneys nor occupying any public or private position in which they may be called upon to give

legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law may be inactive members at their election." GA. BAR RULES & REGS. R. 1-202(a). "Active members shall be all other lawyers including judges . . . GA. BAR RULES & REGS. R. 1-202(b). State judges clearly must belong to the mandatory bar, but the rules do not specifically address the status of federal judges.

HAWAII – ACTIVE STATUS

The Hawaii Constitution is silent with regard to whether the bar license must be classified as "active" at the time of appointment or while a judge is serving on the bench. As a matter of tradition and practice judges maintain "active" licenses during their tenure on the bench. Marsha Kitagawa, Public Affairs Officer, Hawaii State Judiciary.

IDAHO – AFFILIATE STATUS*

All persons who have been heretofore, or shall hereafter be, duly admitted to practice law before the Supreme Court of this state, and who have not been disbarred or suspended therefrom, and who shall have paid the license fee in this Act provided for, and all judges of the district and Supreme Courts of this state, and of the district court of the United States for Idaho, are hereby declared to be members of the Idaho State Bar. IDAHO CODE § 3-405 (2007). However, judges are not subject to the licensing requirements; they do not pay license fees or submit license forms to the Idaho State Bar. Judicial discipline is not handled by the bar but by the Idaho Judicial Council. The other statuses are: active, affiliate, inactive, house counsel, emeritus. "We don't consider federal administrative law judges in the judge category. I think they have licensed as affiliates but my understanding is that now the rules have changed and they need to have an active license." Email from Diane Minnich (June 26, 2007).

KENTUCKY – ACTIVE STATUS

All state and federal judges and justices are active, dues paying members. SUP. CT. R. 3.030, 3.040. However, "both Article III judges and state court judges have a reduced dues requirement." Email from James L. Deckard, Executive Director, Kentucky Bar Association (May 9, 2007).

LOUISIANA – ACTIVE STATUS

All persons, including judges, who are licensed to practice law in Louisiana are active members of the Louisiana State Bar Association. LA. STATE BAR ASS'N ARTICLES OF INC. art. IV, § 1. Email from Loretta Larsen, CAE, Executive Director, Louisiana State Bar Association (May 14, 2007).

MICHIGAN – ACTIVE STATUS

"A person engaged in the practice of law in Michigan must be an active member of the State Bar. In addition to its traditional meaning, the term "person engaged in the practice of law" in this rule includes a person licensed to practice law in Michigan or another jurisdiction and employed in Michigan in the administration of justice or in a position which requires that the person be a law school graduate, but does not include (1) a judicial law clerk who is a member or is seeking to become a member of the bar of another jurisdiction and who does not intend to practice in Michigan after the clerkship ends, or (2) an instructor in law." MICH. STATE BAR R. 3(a).

MISSISSIPPI – ACTIVE STATUS

In Mississippi, attorneys elected or appointed to the bench are considered in good standing and active members of the Bar. MISS. CODE ANN. § 9-1-25. Email from Betty Sephton, Clerk Sup. Ct. of Appeals (May 8, 2007).

MISSOURI—DEEMED ACTIVE

Designations such as "active", "inactive" etc., are not used by the Missouri bar. Persons in good standing with the bar must pay annual dues, including ALJs and judges, unless they are retired, have been licensed for 50 years, or are 75 years or more old. SUP. CT. R. 6.01, confirmed by email from Bill L. Thompson, Counsel, Supreme Court of Missouri (June 20, 2007).

MONTANA – JUDICIAL STATUS

ALJs are judicial members of the mandatory bar. MONT STATE BAR BYLAWS art. 1, § 3(a). Email from Betsy Brandborg, Bar Counsel (May 8, 2007).

NEBRASKA -- ACTIVE STATUS

Judges are active members of the Bar. RULES CREATING, CONTROLLING AND REGULATING THE NEB. STATE BAR ASS'N R. 32.1. Email from Jane Schoenike, Director, Nebraska State Bar Association (July 2, 2007).

NEVADA – ACTIVE STATUS

"Members of the state bar shall be divided into four classes: (a) Active members admitted to practice in any jurisdiction 5 years or more. (b) Active members who are also members of the federal judiciary, regardless of years of admission to practice in any jurisdiction. (c) Active members admitted to practice in any jurisdiction less than 5 years, (d) Inactive members." NEV. SUP. CT. R. 98 1. "No member of the state bar actively engaged in the practice of law in this state, or holding any judicial office in this state, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position where he is called upon to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law in this state, shall be enrolled as an inactive member." NEV. SUP. CT. R. 98 4 (copy provided by Rob W. Bare, Bar Counsel).

NEW HAMPSHIRE – "INACTIVE" : NO STATE BASED REQUIREMENT

"The membership of this Association shall consist of two classes known respectively as "active" members and "inactive" members. Every member shall be an active member unless, upon request and payment of any required Administrative Fee as set by the Board of Governors, that person is enrolled as an inactive member. No person shall be eligible for enrollment as an inactive member who is engaged in the practice of law in this State, or who occupies a position the duties of which require the giving of legal advice or service in this State. Any inactive member in good standing may change classification to that of an active member [etc.]" N.H. BAR CONST. art. II, § 3. "[There] appears to be no state-law imposed law license status for federal administrative law judges." Email from Landya B. McCafferty, Disciplinary Counsel, Attorney Discipline Office, Concord, New Hampshire (July 24, 2007).

NEW MEXICO – [no response to inquiry; presumably "active" status]

"All circuit court of appeals judges, district court judges, bankruptcy judges and full-time magistrates of the United States who reside in New Mexico and all full-time judges of tribal courts who have an L.L.B. or J.D. degree and who reside in New Mexico or exercise jurisdiction in New Mexico shall be honorary members of the state bar with the same rights and privileges as active status members. Honorary members shall not pay any license fees. Honorary members may not engage in the private or public practice of law." N.M. BAR R. 24-105.

NORTH CAROLINA – ACTIVE STATUS*

The active members shall be all persons who have obtained licenses entitling them to practice law in North Carolina, including persons serving as justices or judges of any state or federal court in this state, unless classified as inactive members by the council. All active members must pay the annual membership fee. N.C. ADMIN. CODE ch.1, sub. ch. A, § 0201(b). "Approximately, fourteen years ago, the federal district court judges determined that they do not have to hold active law licenses from North Carolina. Since that time, most of the federal district court judges have petitioned for and been granted inactive status. To serve in the North Carolina state courts, however, the judge must have an active North Carolina law license." Letter from Tammy Jackson, Membership Director (June 21, 2007). (For the response of Hon. Louise W. Flanagan, Chief Judges, U.S. Dist. Court, E.D.N.C., *see* note 59.)

NORTH DAKOTA -- MEMBER OF THE STATE BAR

"The membership of the state bar association of North Dakota consists of every person: 1. Who has secured an annual license to practice law in this state from the state board of law examiners in accordance with section 27-11-22; or 2. Who has an unrevoked certificate of admission to the bar of this state and who has paid an annual membership fee to the state bar association." N.D. CENT. CODE §27-12-02. "The Rules of the State Bar Association of North Dakota, adopted pursuant to its bylaws, shall be filed with the Clerk of the Supreme Court." N.D.R. PROC. R. § 9A.

"In North Dakota, we do not have a special status for Article III judges.... We are a mandatory bar state, so upon licensure someone

is a member of the North Dakota State Bar Association. Admitted, but unlicensed members may become Associate members of the Association for a nominal fee, but do not have voting privileges in the Association." Email from Penny Miller, Clerk, North Dakota Supreme Court (May 8, 2007).

The Bylaws of the ND State Bar do not specify membership categories.

OKLAHOMA – ACTIVE STATUS

"Members of the Association shall be divided into three classes, namely, (a) active members, (b) senior members, and (c) associate members. No other categories of membership may be allowed." RULES CREATING THE OK. BAR ASS'N art 2, § 2. "[It appears, based on my research, that] there is no distinction made between judges and attorneys, or between judges of record and federal administrative law judges. Many Judges have Active status, and a few have Senior status. I have found none with Associate status. Associate status is usually only for those disabled for a prolonged period." Email from Tom Ellis, Intern, Office of General Counsel, Oklahoma Bar Association (July 16, 2007).

OREGON – INACTIVE STATUS

A member of the Bar who does not practice law may be enrolled as an inactive member. The "practice of law" for purposes of this subsection consists of providing legal services to public, corporate or individual clients or the performing of the duties of a position that federal, state, county or municipal law requires to be occupied by a person admitted to the practice of law in Oregon. ORE. STATE BAR BYLAWS 6.100(b).

RHODE ISLAND – JUDICIAL STATUS

"Article X of The Rhode Island Code of Judicial Conduct and Canons of Judicial Ethics, titled 'Application of the Code of Judicial Conduct', provides: "Anyone . . . who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate . . . is a judge within the meaning of this Code . . ."

Full time judges and retired judges who are eligible on temporary judicial assignment and are not engaged in the practice of law shall

be classed as "judicial" members. R.I. BAR ASS'N BY LAWS art. III, § 3.3.

"Several judges in this office were active lawyers in Rhode Island prior to their appointment as federal ALJ's. They have discussed the Rhode Island Supreme Court and Bar Association Rules (and ALJ's appropriate status under those rules) with officials of the Court and Association, respectively. They are informed by those officials that the appropriate status for federal ALJ's is "judicial," and those ALJ's are so licensed/registered, with both the Court and the Association."

Members of the State and Federal judiciary are exempt from the payment of the [annual] registration fee while holding said office." R.I SUP. CT. R. art. IV, R. 2. "Judges are also excused from Bar Association membership dues or other fees."

"Article IX, Section G of the Code, entitled "Practice of Law", provides: 'A judge shall not practice law . . .'" Email from Judge Hugh Atkins (Aug. 6, 2007).

SOUTH CAROLINA—JUDICIAL STATUS

The following persons who are licensed to practice law in this State ... shall be classified as judicial members: . . . all judges of Federal Courts, including Federal Magistrates and Administrative Judges. S.C. BAR BY-LAWS art. 1, § 1.1; Email from Emory Smith, SC Attorney General's Office (May 11, 2007).

SOUTH DAKOTA -- [unclear; no response to inquiry]

"The membership of the state bar shall be all persons who are now or may hereafter be entitled to practice law in this state." S.D. CODIFIED LAWS § 16-17-3. The state bar has the power to adopt bylaws and rules. S.D. CODIFIED LAWS § 16-17-7. This author has been unable to locate any relevant bylaw or rule.)

TEXAS -- [inquiry unanswered; apparently inactive status]

Membership in the State Bar of Texas "is one of four classes: active, inactive, emeritus, or associate" TEX. GOV'T CODE § 81.052(a). An inactive member is a person who is eligible for active membership but not engaged in the practice of law in Texas. TEX. GOV'T CODE § 81.052(c)(1). "A judge shall not practice law except as permitted by statute or this Code." TEX. CODE JUDICIAL CONDUCT Canon 4.

UTAH – INACTIVE STATUS

"All state judges of courts of record in Utah must be licensed here. At present, they also must be on "active" status. That may change, however, sometime in the future, based on our relatively new Utah Supreme Court definition of the practice of law found at Rule 14-801(Authorization to Practice Law) in the Utah Supreme Courts Rules of Professional Practice. . . . Most state administrative law judges must also be licensed and on "active" status for the same reasons. . . The requirement to be on "active" status does not apply to federal administrative law judges just as they do not apply to federal district or appellate court judges within our state [on the theory of federal preemption]." Email from Katherine A. Fox, General Counsel, Utah State Bar (July 10, 2007).

VIRGINIA – JUDICIAL STATUS

Four classes of membership: "active", "associate" (i.e., attorneys residing and practicing outside of Virginia), "judicial" and "disabled/retired". "All full time judges . . . and other officers qualified but forbidden by statute to practice law . . . shall constitute the Judicial membership of the Virginia State Bar." VA. SUP. CT. R. Part 6, § IV, ¶ 3. "If a judge were to maintain his or her active status, he or she could be accused of holding out as authorized to practice law in Virginia, thus violating Virginia's Unauthorized Practice of Law Rules." Letter from James M. McCauley, Ethics Counsel, Virginia State Bar (May 21, 1999).

WASHINGTON – INACTIVE STATUS

While, a "full time administrative law judge is eligible for judicial status", BY LAWS OF THE WASHINGTON STATE BAR ASSN. art. II A 3, and while "judicial members are not required to pay the annual fee required of inactive members," WASH. STATE BAR ASSN. BY LAWS art. II A 4, this language "has always been interpreted to mean state ALJs [and does not apply to] Federal ALJs. . . . [This] is the consistent interpretation that has been applied for many years." Email from Jean McElroy, Director of Regulatory Service, WSBA (July 24, 2007).

WEST VIRGINIA – INACTIVE STATUS

The State Bar By-Laws art. II, § 4 specifies that "every judge of a court of record", a member of the faculty of law of the College of

Law, West Virginia University, and certain others "shall be enrolled as an inactive member" but is silent regarding ALJs. Cheryl L. Wright, Administrative Assistant, The WV State Bar, states that "All judges are inactive status, since they do not practice law outside of their scope of being a judge." Email from (June 19, 2007).

WISCONSIN – JUDICIAL STATUS*

". . . Judges of courts of record, full-time family court commissioners, full-time court commissioners, U.S. bankruptcy judges, U.S. magistrate judges and retired judges who are eligible for temporary judicial assignment and are not engaged in the practice of law are classed as judicial members. . ." SUP. CT. R. 103(3)(a). * "At this time [June 2007], the matter of ALJ's being judicial members is under review Wisconsin Supreme Court. The Bar has asked for clarification of S.C.R. 10.03(3)(a) which covers judicial membership. The Court has asked the Bar to conduct a study of the and report the findings so they will be able to issue an opinion". Email from Julie A. Chrisler, Member Records Manager, State Bar of Wisconsin (June 20, 2007).

WYOMING -- ACTIVE OR INACTIVE STATUS?

The members of the State Bar shall be divided into four (4) classes known respectively as active, inactive, honorary and retired. An inactive member is one not practicing law in Wyoming and electing to pay the reduced license fee. An honorary member is a Wyoming Supreme Court justice, district court judge, circuit court judge, magistrate, judge of the United States District Court for the District of Wyoming and any other federal judge resident of this state, and a justice or judge retired from such courts who has not resumed the practice of law. A retired member is one not engaged in the practice of law. All other members are active members. WYO. STATE BAR BYLAWS art. I, § 3(A)(c). Only active members may practice law. No individual other than an enrolled active member of the State Bar shall practice in this state or in any manner hold themselves out as authorized or qualified to practice law. . . WYO. STATE BAR BYLAWS art. I, § 3.

B. Voluntary State Bars

ARKANSAS – ACTIVE STATUS

"Judges of courts of Record in the State of Arkansas are required to be active members of the Bar of Arkansas and keep their licenses current." Letter of Stark Ligon, Executive Director, Supreme Court of Arkansas Office of Professional Conduct (June 27, 2007).

COLORADO – ACTIVE STATUS

"[Each] year, every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall annually file a registration statement and pay a fee . . . The annual fee for an attorney on inactive status [is reduced]" COLO. R. CIV. P. 227. "[O]ur registration card has in bold letters the would "active." Email from Judge Jon L. Lawritson (July 26, 2007). "Nothing in this section shall be construed to require membership in a professional organization or bar association as a prerequisite to licensure." COLO. REV. STAT. 12-5-101. With certain exceptions, judges are prohibited from practicing law. COLO. REV. STAT. 13-2-107; 12-5-110.

CONNECTICUT – NO FORMAL DESIGNATION: PROBABLY DEEMED "ACTIVE"

Section 2-27(d) of the Connecticut Practice Book specifically exempts federal judges (including magistrate judges, administrative law judges and bankruptcy judges) from the annual registration requirement imposed upon attorneys admitted in Connecticut. However, aside from this, I am not aware of any rule or provision which would otherwise alter the status of such judges, so they would probably be considered "active" for the purposes of your survey. Christopher L. Slack, First Assistant Bar Counsel, Statewide Grievance Committee.

DELAWARE—JUDICIAL STATUS

Supreme Court Rule 69(e)

(http://courts.delaware.gov/Rules/#supreme) provides that "Judicial members" of the Delaware Bar are "those judges, commissioners and masters who are disqualified from the practice of law and those retired judges who do not practice law." In addition, "judicial members are exempt from the process of annual registration with the Court." Email from Michael S. McGinniss, Office of Disciplinary Counsel, Supreme Court of Delaware (July 9, 2007).

ILLINOIS – INACTIVE STATUS

Although the Illinois State Bar Association recognizes various status categories, it is a voluntary association and no lawyer is required to join. However, every attorney admitted to practice law in Illinois is required to register and pay an annual registration fee. ILL. SUP. CT. R. 756(a).

No registration fee is required of any attorney during the period he or she may be serving in the office of justice, judge, associate judge or magistrate of a court of the United States of America or the State of Illinois or the office of judicial law clerk, administrative assistant, secretary or assistant secretary to such a justice, judge, associate judge or magistrate, or during any period in which he or she is receiving a retirement annuity pursuant to Title 28, Chapter 17 of the United States Code or Chapter 40, Act 5, Article 18 of the Illinois Compiled Statutes.

ILL. SUP. CT. R. 756(a)(4) (administrative law judges are not eligible for this exemption).

"Active" status is not specifically defined in the Supreme Court rules, but the rules permit an attorney to assume inactive status and, thereafter, register as an inactive status attorney. The annual registration fee for an inactive status attorney [is reduced]. Upon such registration, the attorney shall be placed upon inactive status and shall no longer be eligible to practice law or hold himself or herself out as being authorized to practice law in.

ILL. SUP. CT. R. 756 (a) (5). Since ALJs neither practice law nor hold themselves out as authorized to practice law as those terms are understood in Illinois (ILL. CONST., ART. VI, § 13 provides that state Supreme Court Judges "shall not practice law"), ALJs appear to be eligible for inactive status (reduced registration fee), but have been denied full waiver of the registration fee on the grounds that the ALJ position does not fall within one of the categories listed in Rule 756(a)(4). However, every attorney admitted to practice law in Illinois is required to register and pay an annual registration fee to the Illinois Attorney Registration and Disciplinary Commission. ILL. SUP. CT. R. 756(a). Presently, ALJs are not exempt from the registration fee. AALJ Comment on Proposed Rule 5 C.F.R. 930.204(b) and email from Judge Michael Logan.

INDIANA – NO STATE BASED REQUIRED STATUS

"Indiana state judges must be in active good-standing (IND. R. ADMIS. B. & DISC. ATT'Y 1). There is no rule that positively states this, but it is a logical inference from the fact that in order to take inactive or retired status, one must file an affidavit stating, inter alia, that one 'neither holds judicial office nor is engaged in the practice of law in this state.' The terms active and inactive good-standing are not explicitly defined, but there are definitions that are easily inferred from the rules. IND. R. ADMIS. B. & DISC. ATT'Y 2(b) (requires members of the bar to register annually and pay an annual fee. Ind. IND. R. ADMIS. B. & DISC. ATT'Y (a)). Thus, the answer to your question is that Indiana state judges must pay the annual active registration fee. Email from Donald R. Lundberg, Executive Secretary, Indiana Supreme Court Disciplinary Commission (July 13, 2007).

However, "federal court judges and federal administrative law judges do not have any state-based required status for their Indiana law licenses." Email from Donald R. Lundberg (July 11, 2007).

The reason I come to the position I have on federal judges and administrative law judges is that they are not judges or law practitioners 'in this state.' This is simply an application of federalism. They may be physically located in Indiana, but their professional activities are 'in' the federal arena. . . . I believe the Supremacy Clause would preclude a state from requiring that federal judges and ALJ's be state bar members.

Email from Donald R. Lundberg (July 13, 2007).

IOWA – ACTIVE STATUS

All judges must be active and in good standing. IOWA CT. R. 39.5, 39.6, 41.3. An ALJ in the federal government would be classified as "government" and would be expected to file annual reports, pay the annual fee for support of the disciplinary system, and also pay any required assessments for the Client Security Trust Fund.

Email from Paul H. Wieck II, Executive Director & Assistant Court Administrator, Iowa Supreme Court (May 14, June 19, 2007).

KANSAS – INACTIVE STATUS

"All attorneys, including justices and judges, admitted to the practice of law before the Supreme Court of the State of Kansas" must register annually. . . Attorneys may register as: active; inactive; retired; or disabled due to mental or physical disabilities. Only

attorneys registered as active may practice law in Kansas. KAN. SUP. CT. R. 208 (a).

"Each active Supreme Court Justice, Court of Appeals Judge, and District Court Judge within the State of Kansas shall earn a minimum of 40 hours of approved continuing judicial education in each 3-year period," KAN. SUP. CT. R. 501, but "unless exempt under subsection (d) of this rule, each attorney admitted to practice law in Kansas shall earn a minimum of twelve (12) continuing legal education (CLE) credit hours in each annual registration period." KAN. SUP. CT. R. 802. Subdivision (d)(3) exempts from the CLE requirement "[f]ederal and state justices and judges who are prohibited from engaging in the private practice of law." KAN. SUP. CT. R. 802(d)(3).

See also "[s]ection 208(f)(2), regarding reinstatement of an attorney who has been in inactive status for more than 5 years and which provides for payment of an additional fee along with, 'full compliance with any conditions imposed by the supreme Court for reinstatement." These, by all appearances, could include conditions beyond showing that one has attended courses affording CLE hours required by rule 802(a).'" Email from Judge Melvin B. Werner, HOCALJ, Wichita ODAR (July 31, 2007).

MAINE – Registered? Inquiry unanswered

The Board of Overseers of the Bar shall, consistent with Rule 6, establish procedures for and supervise the registration of all attorneys admitted to the practice of law in this State. ME. BAR R. 4. A justice or judge shall be subject to the provisions of these rules as to conduct relevant to that person's position as an attorney and as to conduct prior to becoming, or after ceasing to be, a Justice or Judge. ME. BAR R. 1.

MARYLAND – DEEMED "INACTIVE" STATUS

In effect, a judge is "inactive," which is the status of an attorney on the roll of the Court of Appeals of Maryland who elects not to pay the Client Protection Fund assessment because he or she is not engaged in the active practice of law in Maryland. Email from Bedford T. Bentley, Jr., Secretary, State Board of Law Examiners (May 8, 2007).

MASSACHUSETTS – INACTIVE STATUS

Article III federal judges are entitled to assume "judicial status" in registering with the Board of Bar Overseers in Massachusetts. There is no charge for judicial status. Administrative law judges generally are not granted judicial status, but they may, and usually do, assume inactive status, for which they pay half the fee assessed active lawyers. One may also assume retired status, but a lawyer wishing to be restored to active status from retired status must pay the fee applicable to active status for each of the years he or she was on retired status. SUP. JUDICIAL CT. R. 4:02. Email from Michael Fredrickson, General Counsel, Board of Bar Overseers (May 10, 2007).

MINNESOTA – INACTIVE STATUS

"Active" status is held by a "lawyer or judge" who has paid the annual registration fee, is in compliance with the required CLE rules, is not disbarred, suspended or on permanent disability, etc. SUP. CT. R. ON LAWYER REGISTRATION, R. 1 A. The Rule also states: "A lawyer or judge on active status is in good standing and is authorized to practice law in [Minnesota]." However, in Minnesota as elsewhere, "a judge shall not practice law." MINN. CODE JUDICIAL CONDUCT 4 G.

"Inactive status" is available to a lawyer or judge who is retired, disabled, has limited income as described in the rules, or who "does not hold judicial office in Minnesota . . . and is not engaged in the practice of law in Minnesota." *Id.*, R. I C1.

A lawyer or judge on "Inactive Status" is in good standing but is not "authorized to practice law" in the state. *Id.*, R. 1 B.

"Judge" for purpose of the foregoing rules means any judicial officer, referee or other hearing officer employed in the judicial branch of the State of Minnesota." R. 1 C. Since federal ALJs are not included in the definition of "judge" it would appear that both in state and out-of-state resident ALJs are eligible for "inactive" status—assuming, as would be true in virtually every jurisdiction except possibly Tennessee, that sitting as a federal ALJ is not engaging in the practice of law. R. 1 C 1, C 4.

A lawyer duly admitted to practice in [Minnesota] may elect restricted status . . . except that a referee or judicial officer of any court of record of the State of Minnesota or lawyer employed and serving as attorney or legal counsel for any employer, including any governmental unit of the State of Minnesota, is not eligible to apply

for restricted status. A lawyer on restricted status shall not be required to satisfy the educational and reporting requirements of these Rules.

MINN. R. BD. CON'T LEGAL EDUC. 12 (A).

Someone who chooses 'restricted status' is someone who has voluntarily chosen not to comply with the CLE educational and reporting requirements. (*see* rule 2(K) of the CLE rules). In contrast, someone who elects to be on 'inactive status' must still meet the criteria in the definition of 'active status', which includes being in compliance with the CLE rules. It would, I believe, be incorrect to suggest that 'restricted status' is equivalent to 'inactive status.'

Comments and citations provided by Kimberly Tolman, Esq., Senior Attorney, Minneapolis ODAR.

NEW JERSEY – "PLENARY LICENSEE"*

* The terms "active", "inactive", etc., do not signify legal classifications in New Jersey. In order to practice law, one must hold a plenary license to do so and be admitted to the roll of attorneys. N.J. CT. R. 1:27. (The only category other than "plenary" is the limited license available (and restricted) to in-house counsel.) *Id.* "Every judge, temporary judge and acting judge of a municipal court shall be a resident of [New Jersey] and an attorney-at-law admitted to practice in this State . . ." N.J. STAT. § 2B:12-7. There is no state license requirement for federal ALJs or other federal judges. Every holder of a plenary license must contribute to the New Jersey Lawyers' Fund for Client Protection, an annual assessment. N.J. CT. R. 1:28. (This includes NJ judges, since neither statute nor rule exempts them from payment.) In short, all judges, including ALJs, must pay the annual assessment in order to be in good standing; there are no out of state exemptions. Communication of Kenneth J. Bossong, Esq., Director of the New Jersey Fund for Client Protection.

NEW YORK – RETIRED STATUS

Every attorney admitted to practice in New York, whether resident or non-resident, and whether or not in good standing, must file an annual registration statement. 22 N.Y. CODE R. & REGS. § 118.1(a). The attorney must also pay an annual registration fee, unless he or she certifies that he or she has retired from the practice of law. *Id.* at § 118.1(g). The practice of law is defined as giving

advice or providing representation; full time judges, including ALJs, are deemed to be retired from the practice of law. Letter of Michael Colodner, Counsel, State of New York Unified Court System (February 14, 2006).

OHIO – INACTIVE STATUS

Every attorney who is admitted to the practice of law in Ohio must register annually and pay a fee. OHIO GOV. BAR. R. VI § 1(A). An attorney may be granted inactive status by applying to the Attorney Registration Section for an exemption from payment of the registration fee. *Id.* § 2. An inactive attorney shall not be entitled to practice law in Ohio; hold himself or herself out as authorized to practice law in Ohio; hold nonfederal judicial office in Ohio; occupy a nonfederal position in this state in which the attorney is called upon to give legal advice or counsel or to examine the law or pass upon the legal effect of any act, document, or law. *Id.* The same exemption applies to a retired attorney, age 65 or older. *Id.* § 3.

"An ALJ, like other federal attorneys or judges, can be in inactive status for purposes of the Ohio rule, but is not exempt from CLE requirements. Ohio has no special provision governing ALJs." Email from Judge Larry Temin (August 7, 2007).

PENNSYLVANIA – "INACTIVE" STATUS

In Pennsylvania, the Supreme Court exercises exclusive control over regulation of the legal profession, even to the exclusion of the legislature (*see generally* Amanda Irene Figgs, *Annual Survey of Pennsylvania Administrative Law*, 14 WIDENER L.J. 553 (2005)), and the rules with respect to the bar status of ALJs are more or less impenetrable. Email from Suzanne Price, Attorney Registrar for the PA Disciplinary Board advises (July 20, 2007).

"On June 29, 1982, the Disciplinary Board of the Supreme Court of Pennsylvania adopted a policy which interpreted Rule 219(b) (Pa.R.D.E.) to provide that 'Pennsylvania and Federal Court Justices and Judges who serve in Courts of record shall be exempt from payment of the annual assessment.' We are mindful that as a U.S. Administrative Law Judge you are not permitted to privately practice. Unfortunately, the Board has consistently denied exemption of Pa.R.D.E. 219(b) to any person who is not a justice or judge in a court of record in Pennsylvania, and the Supreme Court has consistently upheld the Board's interpretation.

"As you may be aware, attorneys may request inactive status for 3 consecutive years, but they must pay the license fee on the 4th year to avoid having to Petition for Reinstatement. Even though the attorney may pay the fee and request active status, it does not mean that they are practicing law, but allows them to practice law if they so desire." Some ALJ's need to be listed as active because they are not admitted in any other jurisdiction besides PA and need to be in good standing to retain their ALJ status.

Members of the judiciary are exempt from CLE during the period they serve as judges. A member of the judiciary returning to regular active status shall have no deferred CLE requirement but must complete the current requirement within twelve (12) months of returning to active status. PA CLE Judicial Policy Description: If a judge is not permitted to practice law in a private capacity then they are eligible for the Judicial Exception. This policy extends to Administrative Law Judges.

Email from Judge William L. Akers (July 23, 2007).

"First: An 'Inactive' lawyer is Not 'In Good Standing'. Such a lawyer can obtain a certificate of 'Voluntary Inactive in Lieu of Good Standing'. Second: ALJs are NOT considered Judicial and must be either Active or Inactive. Third: If you are Inactive for 3 years or more, and wish to become 'Active' you must apply for 'Reinstatement' which requires, *inter alia.*, 36 hours of CLE of which 12 hours must be in Ethics. Administration of the Rules is done, in part, by The Disciplinary Board of The Supreme Court of Pennsyvania. . . . Annual CLE is required of all 'Active' Lawyers. Only Active Lawyers are able to 'Practice Law' in PA"

TENNESSEE –ACTIVE STATUS

Tennessee Supreme Court Rule 9, section 20 sets forth the requirements for active status and exemptions in order to maintain a license to practice law. Active status is required for all licensed attorneys who are engaged in the "practice of law" as defined in Rule 9(20.2)(e). "Our Supreme Court's policy is that all judges are within that definition and therefore must maintain active status with no applicable exemption." Email from Lance Bracy (May 11, 2007).

VERMONT – EXEMPT

"All judges, whether administrative or not, are exempt from licensing requirements in the State of Vermont." VT. SUP. CT.

ADMIN. ORDER 41, § 5. Email from Wendy Collins, Bar Counsel (May 15, 2007).

C. U. S POSSESSIONS

GUAM -- [no answer to inquiry; presumably active status]

Guam has an integrated bar. "The Bar of Guam is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in Guam. The members of the Bar of Guam are officers of the courts of Guam and have exclusive right to designate themselves as attorneys and counselors, attorneys at law or lawyers." 7 GUAM CODE ANN. § 9A102. Full time judges and justices are prohibited from practicing law. 7 GUAM CODE ANN. § 6110.

NO. MARIANA ISLANDS - [unclear or unsettled; apparently judicial status]

"An attorney once admitted is deemed 'active,' even if he or she no longer resides in the Commonwealth, unless the attorney is disbarred, resigns, or dies." Local Rules of the U.S. Dist. Ct. for the Northern Mariana Islands.

"According to our Director of Courts, bar status of CNMI justices and judges becomes 'judicial' when confirmed to the bench. Their status reverts back to 'active' upon retirement or if they are not retained." Email from Jonathan Grayson, Esq. (September 11, 2007).

Judge Alex R. Munson, U.S. District Court Judge for the Commonwealth of the Northern Mariana Islands (CNMI), "said that when he took the bench he took inactive status in all bar associations of which he is a member. It was his recollection that federal judges were required to either go inactive or resign their bar memberships." Randy Schmidt, Esq., law clerk to Judge Munson.

VIRGIN ISLANDS [no response to inquiry; possibly government or inactive status]

Integrated bar.

The Virgin Islands Bar shall consist of four classes of members: active, government, inactive, and honorary. . . . All attorneys at law admitted to practice in the courts of the Virgin Islands, except those admitted pro hac vice, who are domiciled in the Virgin Islands, are active members of the Virgin Islands Bar. . . . All attorneys at law

who are not active members of the Virgin Islands Bar, but who have been specially admitted to practice law in the Virgin Islands on behalf of the Government of the United States, the Government of the Virgin Islands, Office of the Public Defender or Legal Services of the Virgin Islands, shall be eligible to be government members of the Virgin Islands Bar. . . . Government members shall pay [reduced] annual membership dues. . . . All attorneys at law admitted to practice in the Virgin Islands, except those admitted pro hac vice, who are domiciled in the Virgin Islands, but who neither maintain a law office therein nor actively practice law therein in any manner or to any extent whatsoever, and all attorneys at law admitted to practice in the Virgin Islands, except those admitted pro hac vice, who cease to be domiciled in the Virgin Islands, shall cease to be active members, and those who have filed with the Secretary of the Bar written notice requesting enrollment in the class of inactive membership, shall be inactive members. . . . Inactive members of the Virgin Islands Bar shall pay [token] annual membership dues. . . . The judges of the Court of Appeals for the Third Circuit, the District Court and the Superior Court, and such persons of distinction as may be so elected by the membership shall be honorary members of the Virgin Islands Bar.

V.I. SUP. CT. R. 305.

"An active member of the Bar is an attorney who is admitted to practice . . . . who is in good standing, and who actually engages in the practice of law as authorized." V.I. SUP. CT. R. 306(a). "An inactive member of the Bar is an attorney who ceases to actively practice law in the Virgin Islands . . ." V.I. SUP. CT. R. 306(b). "An inactive member who engages in the active practice of law in any form while on inactive status shall be subject to the contempt powers of the court and (other disciplinary action)." V.I. SUP. CT. R. 306(b)(2). "An inactive member of the Virgin Islands Bar in good standing" can be reinstated to active status. V.I. SUP. CT. R. 306(b)(4).

PUERTO RICO -- ACTIVE STATUS
All judges must be active bar members. Judge Ariel Sotolongo

AMERICAN SAMOA – ELIGIBLE FOR HONORARY STATUS

Integrated bar. "Section 3. Honorary members: Judges and distinguished non-resident lawyers may be elected honorary members." Bylaws of the American Samoa Bar Association. The roster of honorary members includes an administrative law judge.